

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 09-264-03
	:	
v.	:	
	:	
TRANCE KALE	:	CIVIL ACTION NO. 12-6669

MEMORANDUM

Padova, J.

June 7, 2013

Before the Court is Trance Kale's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. For the following reasons, we deny the Motion.

I. BACKGROUND

On October 9, 2009, Trance Kale was convicted by a jury of one count of conspiracy to interfere with interstate commerce by robbery, in violation of 18 U.S.C. § 1951(a) (Count One); two counts of interference with interstate commerce by robbery and aiding and abetting, in violation of 18 U.S.C. §§ 1951(a) and 2 (Counts Four and Eleven); two counts of using and carrying a firearm during and in relation to a crime of violence and aiding and abetting, in violation of 18 U.S.C. §§ 924(c)(1) and 2 (Counts Five and Twelve); and two counts of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1) (Counts Six and Thirteen). The charges arose out of Kale's participation in the armed robberies of Davis Pharmacy on November 10 and 11, 2008, Polanco Grocery on November 13, 2008, Ana Grocery on November 17, 2008, and Haussmann's Pharmacy on November 18, 2008. United States v. Kale, Civ. A. No. 09-264-3, 2010 WL 1718291, at *1 (E.D. Pa. Apr. 26, 2010).

On November 6, 2009, Kale filed post-verdict motions seeking either a judgment of acquittal or a new trial pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure. Kale argued that he was entitled to the requested relief on four grounds: (1) there was

insufficient evidence presented at trial to convict him; (2) the Court improperly admitted expert testimony; (3) the Court improperly admitted hearsay documents; and (4) the Court improperly gave a jury instruction regarding Kale's invocation of the right not to testify. Id. at 2, 6. We denied the motions in a Memorandum and Order dated April 26, 2010. Id. at 11.

Kale was sentenced on June 8, 2010, to a total term of imprisonment of 384 months and one day, consisting of sentences of imprisonment of one day on each of Counts One, Four, Six, Eleven, and Thirteen, to be served concurrently; 84 months on Count Five, to be served consecutively; and 300 months on Count Twelve, to be served consecutively. Kale appealed his judgment of conviction and sentence to the United States Court of Appeals for the Third Circuit on June 22, 2010. He raised two issues on direct appeal: (1) the Court erred in allowing a lay witness, i.e., the custodian of records for Sprint, to testify about how cell phone radio waves reach cell towers in violation of Federal Rules of Evidence 701 and 702; and (2) the Government made improper comments during closing argument. United States v. Kale, 445 F. App'x 482, 485-86 (3d Cir. 2011). The Third Circuit rejected those arguments and affirmed Kale's conviction and sentence on September 20, 2011. Id. at 487. Kale did not file a petition for writ of certiorari to the United States Supreme Court, and his conviction became "final" on December 19, 2011. See Clay v. United States, 537 U.S. 522, 532 (2003).

Kale filed his timely Motion to Vacate, Set Aside or Correct Sentence on November 25, 2012. The Motion raises six grounds for relief based on his counsel's failure to object to certain jury instructions at trial, his failure to object to the imposition consecutive terms of imprisonment at sentencing, and his failure to provide accurate advice regarding his plea. Kale also argues that his appellate counsel was ineffective for failing to raise each of these grounds on direct appeal.

II. LEGAL STANDARD

Kale has moved for relief pursuant to 28 U.S.C. § 2255, which provides as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). “Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors.” United States v. Perkins, Crim. A. No. 03-303, Civ. A. No. 07-3371, 2008 WL 399336, at *1 (E.D. Pa. Feb. 14, 2008) (quoting United States v. Rishell, Crim. A. No. 97-294-1, Civ. A. No. 01-486, 2002 WL 4638, at *1 (E.D. Pa. Dec. 21, 2001)). In order to prevail on a § 2255 motion, the movant’s claimed errors of law must be constitutional, jurisdictional, “a fundamental defect which inherently results in a complete miscarriage of justice,” or “an omission inconsistent with the rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962).

III. DISCUSSION

Kale raises six claims for relief pursuant to § 2255, on the grounds that his counsel, Marc J. Weinstein, provided him with ineffective assistance in violation of the Sixth Amendment.¹ A claim for ineffective assistance of counsel is based on the Sixth Amendment right to counsel, which exists ““in order to protect the fundamental right to a fair trial.”” Lockhart v. Fretwell, 506

¹Kale’s Memorandum addresses several grounds for relief that are not set forth in his § 2255 Motion. In order to afford him full consideration of all of the grounds for relief that he has asserted pursuant to § 2255, we address each ground that is raised in his Memorandum.

U.S. 364, 368 (1993) (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)) (additional citations omitted). A claim for ineffective assistance of counsel must meet the two-part test advanced by the Supreme Court in Strickland. First, Kale must show that counsel:

made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, [Kale] must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. More precisely, Kale must show that (1) his attorney’s performance was “unreasonable under prevailing professional norms, and, unless prejudice is presumed, that (2) there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.’” United States v. Day, 969 F.2d 39, 42 (3d Cir. 1992) (internal citation omitted) (citing Strickland, 466 U.S. at 687-91; and quoting id. at 694). Kale argues that Mr. Weinstein was ineffective for failing to: (1) object to the jury instructions on reasonable doubt; (2) object to the consecutive terms of imprisonment imposed on Counts Five and Twelve; (3) object to the jury instructions on reasonable inferences; (4) object to the jury instructions on using and carrying a firearm; (5) object to the jury instructions on aiding and abetting; and (6) provide him with accurate advice regarding his plea.²

A. Jury Instructions on Reasonable Doubt

Kale argues that Mr. Weinstein was ineffective for failing to object to the jury instructions on reasonable doubt on the grounds that those instructions violated his Fifth

²Kale’s claims for ineffective assistance of counsel are not procedurally defaulted even though he failed to raise them on direct appeal. “[F]ailure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255.” Massaro v. United States, 538 U.S. 500, 509 (2003).

Amendment due process right to a fair trial. To show that jury instructions violated a criminal defendant's Fifth Amendment due process rights, the petitioner "must demonstrate both (1) that the instruction contained 'some ambiguity, inconsistency, or deficiency,' and (2) that there was 'a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt.'" Williams v. Beard, 637 F.3d 195, 223 (3d Cir. 2011) (quoting Waddington v. Sarausad, 555 U.S. 179, 191 (2009)). This inquiry requires us to "focus initially on the specific language challenged, and then to review the challenged instruction in the context of the entire charge and in light of the evidence and arguments presented at trial." Id. (citations and quotations omitted).

Kale specifically argues that the jury instructions failed to properly define reasonable doubt as a subjective state of near certainty. In a criminal prosecution, "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." Victor v. Nebraska, 511 U.S. 1, 5 (1994) (citation omitted). "The inquiry is not, then, whether a particular word or phrase is used, but rather, when 'taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.'" Laird v. Horn, 159 F. Supp. 2d 58, 92 (E.D. Pa. 2001) (quoting Victor, 511 U.S. at 6 (alterations in original)). This standard requires that the instructions "'impressed upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused.'" Victor, 511 U.S. at 15 (alteration omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 315 (1979)).

At trial, the jury was instructed that reasonable doubt is "a fair doubt based on reason, logic, common sense, or experience," "a doubt that an ordinary reasonable person has after carefully weighing all of the evidence," and "an honest doubt," and the Court further explained

that it “does not mean proof beyond all reasonable doubt, or to a mathematical certainty.” (N.T. 09/29/09 at 100, 118.) We find that these explanations of the Government’s burden of proof, which defined reasonable doubt in subjective terms, such as a “fair” and “honest” doubt, effectively instructed the jury that it had to “reach a subjective state of near certitude of the guilt,” and, therefore, “correctly conve[yed] the concept of reasonable doubt to the jury.”³ Victor, 511 U.S. at 6, 15 (quotations omitted). Accordingly, Kale has failed to demonstrate that the instructions on reasonable doubt contained any “ambiguity, inconsistency, or deficiency,” or relieved the Government of its burden of proof. Williams, 637 F.3d at 223 (quoting Waddington, 555 U.S. at 191). Therefore, the jury instructions on reasonable doubt were not improper, and Mr. Weinstein was not ineffective for failing to object to those instructions. Accordingly, we deny Kale’s Motion insofar as he asserts that Mr. Weinstein was ineffective for failing to object to the jury instructions on reasonable doubt.⁴

³Furthermore, the instructions on reasonable doubt given at trial were taken from the Third Circuit’s Model Criminal Jury Instruction on reasonable doubt. (Compare N.T. 09/29/09 at 99-100, 118-19, with Third Circuit’s Model Criminal Jury Instruction 3.06.) Kale does not contend that Model Criminal Jury Instruction on reasonable doubt is constitutionally defective, and the United States Court of Appeals for the Third Circuit has expressed doubt that “the use of our [circuit’s] model jury instruction can constitute error.” United States v. Petersen, 622 F.3d 196, 208 (3d Cir. 2010).

⁴To the extent that Kale asserts an independent claim for relief on the ground that the jury instructions on reasonable doubt violated the Fifth Amendment, that claim is procedurally defaulted because he “neglected to raise [it] on direct appeal.” Hodge v. United States, 554 F.3d 372, 379 (citing Bousley v. United States, 523 U.S. 614, 621 (1998)). Because this ground for relief is meritless, Mr. Weinstein’s failure to raise it on direct appeal does not constitute cause and prejudice that would excuse his procedural default. See United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999). Accordingly, we deny Kale’s Motion insofar as he asserts that the jury instructions on reasonable doubt violated his Fifth Amendment due process right to a fair trial.

B. Consecutive Sentences on Counts Five and Twelve

Kale argues that Mr. Weinstein was ineffective for failing to object to the consecutive sentences imposed on Counts Five and Twelve, on the ground that those consecutive sentences violated his Fifth Amendment right to be free from double jeopardy. The Fifth Amendment reads, in pertinent part, “No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The Double Jeopardy Clause of the Fifth Amendment protects against, *inter alia*, “multiple punishments for the same offense.” United States v. Console, 13 F.3d 641, 663 (3d Cir. 1993) (quoting Ohio v. Johnson, 467 U.S. 493, 498 (1984); and citing United States v. Dixon, 509 U.S. 688, 695-96 (1993)).

Counts Five and Twelve each charged Kale with “using and carrying a firearm during and in relation to a crime of violence,” in violation of 18 U.S.C. §§ 924(c)(1) and 2. The jury convicted Kale on both Counts Five and Twelve, and he was sentenced to a term of imprisonment of 84 months on Count Five, and 300 months on Count Twelve, to run consecutively.

Kale argues that the underlying “crime of violence” identified in both Counts Five and Twelve of the Superseding Indictment is the conspiracy to commit robbery that was charged in Count One, and he cites United States v. Diaz, 592 F.3d 467 (3d Cir. 2010), for the position that the Government cannot bring multiple § 924(c) charges that share the same underlying predicate offense. Kale contends that because both Counts Five and Twelve are based on the same underlying “crime of violence,” i.e., the conspiracy charged in Count One, the imposition of consecutive sentences on those counts constituted multiple punishments for the same offense, in violation of the Double Jeopardy Clause of the Fifth Amendment.

The law is clear, however, that offenses charged as separate crimes may constitute separate predicates for § 924(c) convictions, even if those predicate crimes “occur[ed] as part of the same underlying occurrence.” United States v. Casiano, 113 F.3d 420, 426 (3d Cir. 1997) (citation omitted). “It follows that each [separately charged underlying crime] may be a separate predicate” for a § 924(c) charge. Id. (citation omitted).

Here, the two § 924(c) charges were grounded on two separately charged predicate offenses, albeit offenses that occurred in the course of the also-charged conspiracy. Count Five of the Superseding Indictment charged that “On or about November 11, 2008,” Kale “knowingly used and carried, and aided and abetted the use and carrying of, a firearm, . . . during and in relation to a crime of violence . . . that is, conspiracy to interfere with interstate commerce by robbery and interference with interstate commerce by robbery.” (Superseding Indictment at 12 (emphases added).) Count Twelve of the Superseding Indictment charged that “On or about November 18, 2008,” Kale “knowingly used and carried, and aided and abetted the use and carrying of, a firearm, . . . during and in relation to a crime of violence . . . that is, conspiracy to interfere with interstate commerce by robbery and interference with interstate commerce by robbery.” (Superseding Indictment at 19 (emphases added).)

Thus, the predicate offenses for the two § 924(c) charges were (1) the November 11, 2008 Hobbs Act robbery of the Davis Pharmacy charged in Count Four, and (2) the Hobbs Act robbery of the Haussemann Pharmacy charged in Count Eleven. Because the two § 924(c) counts each identified a separate and distinct predicate crime as the basis for each violation of § 924(c), the imposition of consecutive sentences on Counts Five and Twelve did not result in “multiple punishments for the same offense.” Console, 13 F.3d at 663 (quotation and citation

omitted). Therefore, the consecutive sentences imposed on Counts Five and Twelve did not violate the Double Jeopardy Clause, and Mr. Weinstein was not ineffective for failing to object to those sentences. Accordingly, we deny Kale's Motion insofar as he asserts that Mr. Weinstein was ineffective for failing to object to the imposition of consecutive sentences on Counts Five and Twelve.⁵

C. Jury Instructions on Reasonable Inferences

Kale argues that Mr. Weinstein was ineffective for failing to object to the jury instructions on reasonable inferences, on the grounds that those instructions failed to instruct the jury that it could not draw an inference against Kale unless it found the facts from which the inference was drawn, and that the inference itself, were proved beyond a reasonable doubt. However, Kale confuses the jury's right to draw reasonable inferences with the Government's burden to prove the elements of the charged offenses beyond a reasonable doubt, which are two separate concepts. At trial, we instructed the jury regarding the types of logical factual inferences which the jury was entitled to draw when weighing circumstantial evidence. See Third Circuit's Model Criminal Jury Instruction 1.09. In that regard, we instructed that "[a] reasonable inference is simply a deduction or conclusion that reason, experience, and common sense leads you to make from the evidence." (N.T. 09/29/09 at 105). We further defined a reasonable inference as "a reasoned, logical decision to find that a disputed fact exists on the

⁵To the extent that Kale asserts an independent claim for relief on the ground that these consecutive sentences violated the Fifth Amendment, that claim is procedurally defaulted because he "neglected to raise [it] on direct appeal." Hodge, 554 F.3d at 379 (citing Bousley, 523 U.S. at 621). Because this ground for relief is meritless, Mr. Weinstein's failure to raise it on direct appeal does not constitute cause and prejudice that would excuse his procedural default. See Sanders, 165 F.3d at 253. Accordingly, we deny Kale's Motion insofar as he asserts that the consecutive sentences on Counts Five and Twelve violated the Double Jeopardy Clause of the Fifth Amendment.

basis of another fact.” (Id.) We separately instructed the jury regarding the Government’s burden to prove Kale’s guilt beyond a reasonable doubt as to each and every element of the offenses charged. (See N.T. 09/29/09 at 100 (instructing the jury that the Government had the burden to prove “each and every element of the offenses charged beyond a reasonable doubt”))

Kale’s argument conflates these two concepts, and contends that United States v. Triumph Capital Grp., Inc., 544 F.3d 149 (2d Cir. 2008), stands for the proposition that a jury must be instructed that any inference that it draws must be established beyond a reasonable doubt. However, in that case, the United States Court of Appeals for the Second Circuit simply observed that “[w]here a fact to be proved is also an element of the offense,” the inferences leading to that fact must be “sufficiently supported to permit a rational juror to find that the element [of the offense], like all elements, is established beyond a reasonable doubt.” Id. at 159 (quotation and citation omitted). Contrary to Kale’s assertion, the instructions given at Kale’s trial clearly advised the jury that the Government had the burden to prove each element of every offense beyond a reasonable doubt, and we can conceive of no way in which the instructions on reasonable inferences disturbed the jury’s understanding of that burden. We thus conclude that the jury instructions on reasonable inferences were not improper, and Mr. Weinstein was not ineffective for failing to object to those instructions. Accordingly, we deny Kale’s Motion insofar as he asserts that Mr. Weinstein was ineffective for failing to object to the jury instructions on reasonable inferences.

D. Jury Instructions on Using and Carrying a Firearm

Kale argues that Mr. Weinstein was ineffective for failing to object to the jury instructions on using and carrying a firearm under 18 U.S.C. § 924(c), on the grounds that those

instructions improperly blended the elements of the two prongs of § 924(c). Section 924(c) reads, in pertinent part:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall . . . be sentenced to a term of imprisonment of not less than 5 years.

18 U.S.C. § 924(c)(1)(A). “The plain language of [18 U.S.C. § 924(c)] therefore has two separate prongs, either of which standing alone is sufficient to support a conviction under § 924(c): (1) ‘using or carrying’ a firearm ‘during and in relation to’ the underlying offense; or (2) ‘possessing’ a firearm ‘in furtherance’ of the underlying offense.” United States v. Scott, 463 F. App’x 85, 87 (3d Cir. 2012). Jury instructions on § 924(c) are erroneous if they fail to identify the correct elements of the prong of § 924(c) under which the defendant is charged. See United States v. Jenkins, 347 F. App’x 793, 794-96 (3d Cir. 2009) (finding that the district court erred by instructing the jury that the defendant used or carried a firearm “during and in relation to” a crime, when the indictment had charged possession “in furtherance of” a crime).

Counts Five and Twelve of the Superseding Indictment charged Kale with “us[ing] and carr[ying]” a firearm “during and in relation to” a crime of violence. (Superseding Indictment at 12, 19.) At trial, the jury was instructed that to convict Kale for violating § 924(c), it had to find that:

First, that the defendant committed the crime of interference with interstate commerce by robbery as charged in Counts 2, 4, 7, 9, and 11 of the superseding indictment.

Second, that during and in relation to the commission of [interference with interstate commerce by robbery], the defendant knowingly used and carried a firearm. The phrase “uses or carries

a firearm,” means having the firearm or firearms available to assist or aid in the commission of interference with interstate commerce by robbery.

See, “use” means more than mere possession of a firearm by a person who commits a crime. To establish use, the Government must show active employment of that firearm. If the defendant did not either disclose or mention the firearm, or actively employ it, the defendant did not use the firearm. “Carry” means that the defendant possessed the firearm or had the firearm [on] his person.

Thirdly, that the defendant used and carried the firearm during and in relation to the interference with interstate commerce by robbery. “During and in relation to” means that the firearm must have had some purpose or [e]ffect with respect to that prong. The firearm must have at least facilitated or had the potential of facilitating the interference with interstate commerce by robbery.

....

The Government is not required to show that the defendant actually displayed or fired the weapon. However, the Government must prove beyond a reasonable doubt that the firearm was in his possession or under his control at the time that the Hobbs Act Robbery was committed, and that the firearm facilitated or had the potential of facilitating the crime of interference with interstate commerce by robbery.

(N.T. 09/29/09 at 20-22.)

These instructions mirror the Third Circuit’s Model Criminal Jury Instruction 6.18.924B, which lays out the elements for a charge of “using and carrying” a firearm “during and in relation to” a crime of violence. See Third Circuit’s Model Criminal Jury Instruction 6.18.924B. The Third Circuit’s Model Criminal Jury Instruction 6.18.924A, in contrast, lays out the elements for a charge of “possessing” a firearm “in furtherance of” a crime of violence. See Third Circuit’s Model Criminal Jury Instruction 6.18.924A. At trial, the jury was charged pursuant to Instruction 6.18.924B, which thereby limited the scope of the instructions on Kale’s § 924(c) charge to the first prong of § 924(c). (See N.T. 09/29/09 at 20-22.)

Moreover, those instructions properly delineated the elements of the first prong of § 924(c) by defining the terms “use,” “carry,” and “during and in relation to [a crime of violence].” (N.T. 09/29/09 at 22.) See Bailey v. United States, 516 U.S. 137, 143 (1995) (defining “use” as “active employment”); Muscarello v. United States, 524 U.S. 125, 134 (1998) (defining “carry” as to imply “some degree of possession”); United States v. Williams, 344 F.3d 365, 371 (3d Cir. 2003) (stating that “in relation to” means that the firearm must have “facilitate[d], or [had] the potential of facilitating” the underlying offense). The final paragraph of those instructions further limited the charge to the elements of the first prong of § 924(c), by explaining that the Government must prove that the firearm was “in [Kale’s] possession or under his control,” and that it “facilitated or had the potential of facilitating” the charged robberies. (N.T. 09/29/09 at 22.) The instructions given at trial did not, in any fashion, blend the elements of the two prongs of § 924(c).⁶ We thus conclude that the jury instructions on using and carrying a firearm were proper, and Mr. Weinstein was not ineffective for failing to object to those instructions. Accordingly, we deny Kale’s Motion insofar as he asserts that Mr. Weinstein was ineffective for failing to object to the jury instructions on using and carrying a firearm.

E. Jury Instructions on Aiding and Abetting

Kale argues that Mr. Weinstein was ineffective for failing to object to the jury instructions on aiding and abetting, on the grounds that those instructions failed to explain that to

⁶Kale also argues that § 924(c) delineates two separate offenses, and thus the instructions were defective because they effectively charged him with both prongs of § 924(c). The United States Court of Appeals for the Third Circuit has not decided whether § 924(c) in fact creates two separate offenses. United States v. Scott, 463 F. App’x 85, 89 (3d Cir. 2012). However, we need not decide that question, because, even if it does, Kale’s argument has no merit because he was only charged with violating of the first prong of § 924(c).

convict him of aiding and abetting the use and carrying of a firearm, it had to find that he aided and abetted the principal's use or carrying of the firearm, and that he could not be convicted of aiding and abetting the conspiracy of which he was a principal. Jury instructions on aiding and abetting must require the jury to find that the defendant participated in the "particular 'illicit enterprise'" that is charged in the indictment in order to convict the defendant of aiding and abetting that particular crime. United States v. Kemp, 500 F.3d 257, 300 (3d Cir. 2007) (quoting United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005)). Such instructions must leave "no danger" that the defendant "would be convicted for aiding and abetting some other scheme." Id.

Here, the instructions clearly stated that, to convict Kale of aiding and abetting, the jury would have to find that Kale "aided and abetted the principal in committing interference with interstate commerce by robbery, using and carrying a firearm during a crime of violence, and possessing with the intent to distribute a controlled substance, as charged in the superseding indictment." (N.T. 09/29/09 at 27 (emphasis added).) As such, contrary to Kale's argument, the jury was plainly instructed that to convict him of aiding and abetting under § 924(c), the jury had to find that he "aided and abetted the principal in . . . using and carrying a firearm during a crime of violence," (id. at 27 (emphasis added)), and was not instructed that it could find Kale guilty for aiding and abetting the conspiracy charged in Count One. Thus, there was "no danger" that Kale would be convicted of aiding and abetting the conspiracy rather than convicted of aiding and abetting the firearm charge. Kemp, 500 F.3d at 300. Therefore, the jury instructions on aiding and abetting were not improper, and Mr. Weinstein was not ineffective for failing to object to those instructions. Accordingly, we deny Kale's Motion insofar as he asserts that Mr. Weinstein was ineffective for failing to object to the instructions on aiding and abetting.

F. Failure to Provide Accurate Advice regarding the Plea

Kale argues that Mr. Weinstein was ineffective for failing to provide accurate advice regarding his plea, because Mr. Weinstein misrepresented to him that the initial Indictment charged him with two § 924(c) counts, when it actually only charged him with one count. Kale maintains that “[i]f I knew I was only charged with one 924(c), this case would [have] ended with me pleading guilty. My only reason for going to trial is because of the two 924(c)’s I thought I was charged with in my initial indictment.” (Kale Decl., attached as an exhibit to the Addendum to the Reply.) He further contends that if he had plead guilty, he would have received a sentence far below that which he faced by proceeding to trial.

“Before deciding whether to plead guilty, a defendant is entitled to ‘the effective assistance of competent counsel.’” Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1480-81 (2010) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970); and citing Strickland, 466 U.S. at 686); see United States v. Nigro, 650 F. Supp. 2d 372, 381 (E.D. Pa. 2009) (noting that the “right to effective assistance of counsel attaches at the guilty plea stage and at the making of the decision whether to plead guilty” (citation omitted)). “[A] defendant has the right to make a reasonably informed decision whether to accept a plea offer” and “[k]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.” United States v. Booth, 432 F.3d 542, 549 (3d Cir. 2005) (alteration in original) (quoting Day, 969 F.2d at 43). “Only when the defendant has an understanding of the alternative courses of action can he make an intelligent and voluntary decision to stand trial or plead guilty.” United States v. Sherman, Crim. A. No. 06-545, Civ. A. No. 09-765, 2009 WL 4362568, at *3 (E.D. Pa. Nov. 30, 2009). To establish prejudice based on

his counsel's alleged failure to accurately advise him of the charges in the initial Indictment, Kale "must demonstrate that, but for his . . . attorney's alleged ineffectiveness, he would have likely received a lower sentence." Booth, 432 F.3d at 546-47.

On April 21, 2009, the Government filed an initial Indictment which charged Kale with, *inter alia*, one count of using and carrying a firearm during and in relation to a crime of violence and aiding and abetting, in violation of 18 U.S.C. §§ 924(c)(1) and 2 (Count Five). The initial Indictment also charged three of Kale's co-defendants—but not Kale—with, *inter alia*, one count of using and carrying a firearm during and in relation to a crime of violence and aiding and abetting, in violation of 18 U.S.C. §§ 924(c)(1) and 2 (Count Three).

On May 6, 2009, Kale was arraigned in open court. "The object of arraignment is to inform the accused of the charges against him and obtain an answer from him." United States v. Isaac, Crim. A. No. 05-576, 2008 WL 3919353, at *9 (E.D. Pa. Aug. 26, 2008) (citing Garland v. Washington, 232 U.S. 642, 644 (1914)). The charges in the initial Indictment were read to him, and the docket entry for his arraignment states that he was arraigned only as to Counts One, Four, Five, and Six of the initial Indictment. (See Docket No. 17.) The docket similarly indicates that Kale entered a plea of "Not Guilty on counts 1, 4, 5, 6." (Id.) Thus, at the May 6, 2009 arraignment, Kale was specifically advised that he was only named in one of the § 924(c) counts, Count Five, and was not named in the second § 924(c) count, Count Three. He also entered a "not guilty" plea as to the counts of the initial Indictment in which he was named. Thus, the evidence of record establishes that as of May 6, 2009, Kale knew or should have known that the initial Indictment only charged him with one § 924(c) count.

Consequently, even if Mr. Weinstein had misinformed him as to the number of § 924(c) counts in which he was named, Kale cannot establish that he was prejudiced by that misinformation because he knew or should have known at his arraignment of the actual charges against him, and still decided to enter a not guilty plea.⁷ We therefore conclude that because Mr. Weinstein’s alleged failure to give correct advice to Kale about the charges in the initial Indictment did not affect his decision to plead not guilty, Kale has failed to satisfy Strickland’s “prejudice” prong. We deny the Motion on that basis.⁸

IV. CONCLUSION

For the foregoing reasons, we deny Kale’s Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 in its entirety.⁹ An appropriate order follows.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.

⁷Kale does not argue that Mr. Weinstein failed to inform him of his right to enter an open guilty plea. See Booth, 432 F.3d at 550 (holding that the district court should have held an evidentiary hearing based on the petitioner’s argument that his counsel “failure to advise him about all possible plea options”). Nor does he allege that Mr. Weinstein failed to communicate a formal plea offer from the Government, see Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012), or that Mr. Weinstein advised him to reject an existing plea offer and instead proceed to trial, see Lafler v. Cooper, 132 S. Ct. 1376 (2012).

⁸Kale also asserts that Mr. Weinstein provided ineffective assistance by failing to raise each of the issues he asserts in the instant Motion on direct appeal. Because all of the issues raised in the instant Motion are meritless, this argument also fails.

⁹We are “required to hold an evidentiary hearing unless the motion and files and records of the case show conclusively that the movant is not entitled to relief.” United States v. Lilly, 536 F.3d 190, 195 (3d Cir. 2008) (quoting United States v. Booth, 432 F.3d 542, 545-46 (3d Cir. 2005)). The evidence of record fails to establish any meritorious ground for relief in this case, and, accordingly, an evidentiary hearing is unnecessary.